[Cite as *Simmons v. Ohio Dept. of Transp.*, 2015-Ohio-5620.]

Court of Claims of Ohio
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DAVID B. SIMMONS

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant/Third-Party Plaintiff

v.

FECHKO EXCAVATING, INC.

Third-Party Defendant

Case No. 2013-00442

Magistrate Robert Van Schoyck

DECISION OF THE MAGISTRATE

{¶1} Plaintiff, David B. Simmons (Simmons), brought this action for negligence based upon allegations that the sign outside his business was damaged as a result of being struck by a front-end loader operated by an employee of third-party defendant, Fechko Excavating, Inc. (Fechko), during a highway construction project for which defendant/third-party plaintiff, Ohio Department of Transportation (ODOT), was responsible. ODOT subsequently filed a third-party indemnity claim against Fechko. The matter was referred to the undersigned magistrate and proceeded to trial.

{¶2} At trial, Simmons testified that he and his wife own and operate a retail shop known as All About Pets, located at 9285 Cincinnati-Columbus Road (U.S. Route 42), West Chester, Ohio 45069, and that they have been in business there since purchasing the property in 2000. Simmons stated that the building housing the shop is set back about 50 feet from the highway, and in between there is an asphalt parking lot.

Simmons stated that the sign in question is at the outer edge of the parking lot, about 10 to 15 feet from the highway.

{¶3} As depicted in several photographs that were admitted into evidence, the sign consists of a metal frame roughly in the shape of an upright rectangular box with a small circle atop, and on both sides of the frame there are vinyl sign faces stating “All About Pets” in the rectangular box, while the sign faces in the circular part of the frame say “Pet Shop.” The frame is mounted with brackets onto an upright metal pole lodged in the ground. The sign is situated such that one side is visible to northbound highway traffic, and one side is visible to southbound traffic. Simmons testified that the sign was there when he purchased the property and that he does not know when it was erected, but that in 2001 the sign faces were replaced and the pole and frame were painted.

{¶4} Simmons testified that the accident occurred on or about December 8, 2011, during the early stages of an approximately two-year project to rebuild and improve the highway through this area. Simmons stated the front face of the shop is all glass, and that he stood there watching the construction around noon that day because the activities had cut off access to his parking lot for a time, leaving him without any customers. According to Simmons, an excavator was going along the southbound side of the highway along which his property is located, digging up pavement and putting it in a dump truck that sat toward the center of the highway on the remaining pavement. Simmons recounted that as the operation approached his property, there was no dump truck available for a period of time, so the operator of the excavator deposited about four or five shovelfuls of removed pavement materials on the edge of his parking lot. Simmons stated that once another dump truck arrived, a large front-end loader with a Fechko decal came by and started scooping up the pile of materials, and in the process of doing so backed into the sign pole.

{¶5} Simmons testified that the collision made a loud enough noise that everyone in the area stopped to look, and that it left the pole bent or leaning at a significant angle, as if it were pointing to 9 or 10 o'clock from the bottom of a clock face, and that the pole appeared to be touching some of the overhead utility lines that run parallel to the highway. Simmons stated that he went outside and observed the operator of the front-end loader get out of the cab, throw his hat down and curse, and that by the time Simmons made it over to the scene there were already a couple of construction personnel there, one of whom introduced himself as Nick Turrell and said he worked for Fechko and was in charge of the operation. According to Simmons, Turrell instructed the operator of the front-end loader to get back in the cab and push the sign off the utility lines and back into an upright position, which he did, and Turrell assured Simmons that Fechko would make sure any damage was fixed or compensated for. Simmons stated that he also talked to West Chester Township Police Sergeant Todd Campbell, who was directing traffic in the construction zone, about the accident and asked to have a report made, but Campbell declined to do so.

{¶6} Simmons testified that as time went on after the accident, he approached Turrell several times during the course of the project and was told that things would be taken care of, but nothing happened. Simmons further testified that the last time he saw Turrell, around December 2012, Turrell said he could not recall anything about the accident, but that he would come by at 11:00 a.m. the following day; however, Turrell did not show up. Simmons stated that in addition to his efforts with Turrell, he contacted ODOT's project engineer, Jason Hass, and he also contacted Sharon Shamalski, whom he understood to be the project manager for ODOT. Simmons recalled that Shamalski had come through the area before construction began to brief him and others in the area about the project. According to Simmons, the individuals he spoke to at ODOT told him to try to work things out with Fechko. Simmons stated that

he ended up filing the instant lawsuit after failing to obtain any relief from Fechko or ODOT.

{¶7} Simmons stated that the sign and pole have remained in essentially the same condition ever since the accident. According to Simmons, the pole was bent during the accident at a point about three or four feet from the ground, and was then bent back into place by the loader afterward, although he stated that a photograph he took shows the pole still leans slightly. (Joint Exhibit 7.) Other photographs depict the points on either side of the pole where it was impacted by the loader, during the accident and when it was pushed upright. (Joint Exhibits 4, 5.) Simmons testified that the concrete foundation holding the pole in the ground was also cracked during the accident, thereby loosening the pole to the point that it sways when the wind blows, and he stated that a photograph he took of the foundation shows cracking where there had previously been none. (Joint Exhibit 6.) Simmons further testified that two of the four mounting brackets that held the sign frame to the pole were broken, thus loosening the sign frame from the pole, and that the light bulbs inside the sign frame were broken.

{¶8} Simmons admitted that one of the rectangular sign faces has a crack in it that pre-dates the accident. The crack, as depicted in a photograph, covers much of the lower portion of the sign face, and a piece of the face along the crack is completely gone. (Joint Exhibit 20.) Simmons also admitted that the lettering on the sign faces is peeling or fading away from exposure to the elements, and that the sign in general has experienced some deterioration unrelated to the accident. And, Simmons stated that he does not believe the shop has seen a decline in revenue since the accident.

{¶9} According to Simmons, he has contacted three or four sign companies to inquire about having the sign repaired, but none of them will perform any sort of repair because of what happened to the pole. Thus, Simmons stated that he has not been able to get the sign faces replaced, the mounting brackets fixed, or the light bulbs replaced. Simmons testified that he obtained an estimate for replacing the entire sign,

however, from ABC Signs, and that he purchased a $150 permit from the West Chester Township Community Development Department that he would need in order to go forward with the total replacement. (Joint Exhibit 12.)

{¶10} Sergeant Todd Campbell testified that he has been employed with the West Chester Township Police Department for over 12 years, and that he was assigned to direct traffic in the construction zone on the day of the accident, as he did several times over the course of the project. Campbell stated that when the accident occurred he was just south of All About Pets, and from his position he witnessed the loader back into the pole while putting debris into a dump truck. Campbell recalled that the point of impact was near the base of the pole and that the pole was bent or dislodged such that it leaned at an angle of roughly 30 to 40 degrees. Campbell stated that he saw Simmons come out of the shop and talk with the operator of the loader and another individual who might have been the foreman, and that Simmons also came up and spoke with him at some point. Campbell testified that he continued to direct traffic and did not write a police report. According to Campbell, the project lasted about two years overall, adding a middle turn lane and making other improvements to the highway, and construction activity extended into the parking lots of just about all the businesses on this stretch of the highway.

{¶11} Cliff Meyer, owner of ABC Sign in Cincinnati, testified that he founded his company 35 years ago and is familiar with all aspects of the sign business, including the preparation of estimates, which he does regularly. Meyer stated that ABC Sign performs about 100 sign replacement or repair jobs each month. Meyer testified that when Simmons initially contacted ABC Sign, he came out and inspected the sign and prepared an estimate that amounted to $11,400 plus tax. (He stated that the sales tax in Butler County is 6.5%.) Meyer testified further that based upon the passage of time between his initial visit and the date of trial, he inspected the sign again in 2014 and prepared a new estimate that amounted to $15,950 plus tax. Meyer related that the

difference in the estimates owes to the increased cost of materials, as well as to the fact that the sign is in close enough proximity to overhead power lines that certain OSHA regulations would come into effect and increase the installation costs, which he had overlooked when preparing the first estimate.

{¶12} In short, Meyer testified that the most cost-effective solution is a total replacement of the sign, including the pole. Meyer explained that, based upon his understanding that the pole had been bent, and while acknowledging that he is not a structural engineer, he operates under the assumption in such cases that the structural integrity of the pole is compromised and that the pole must be replaced. According to Meyer, he has seen poles dented or damaged in this fashion about a dozen times, and his company has never repaired one. Meyer also testified that two of the four mounting brackets are broken, one of the auxiliary support cables that were sometimes used on older signs like this is broken, and the sign frame is twisted and damaged inside.

{¶13} Meyer explained that in the sign industry, no one wants to be the last one to work on a sign that ends up falling and injuring someone, and given the damage involved here, particularly to the pole, his company would insist on replacing the whole thing. Meyer acknowledged that his estimate for a replacement comprised of all new materials would represent an improvement over the existing sign. Meyer also stated that most poles today are made of aluminum, but that this one is made of steel. According to Meyer, steel poles that have stood out in the elements like this have a useful life in that they should be replaced after about 40 years, and he estimated that this particular pole appears to be more than 20 years old. Meyer allowed that if money is no object, it may be possible to repair the existing sign, perhaps by placing a metal sleeve over the pole, but that it is cheaper by far to simply replace everything. While Meyer did not itemize his estimate for the replacement job, he testified that the replacement of the pole and foundation comprise about half of the estimate.

{¶14} "In order to establish actionable negligence, a plaintiff must show the existence of a duty, a breach of that duty, and an injury proximately caused from said breach." *Nevins v. Ohio Dept. of Transp.*, 132 Ohio App.3d 6, 23 (10th Dist.1998), citing *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981). "Pursuant to R.C. 5501.11, ODOT has the responsibility to construct and maintain highways in a safe and reasonable manner." *Rhodus v. Ohio Dept. of Transp.*, 67 Ohio App.3d 723, 729-730 (10th Dist.1990).

{¶15} Here, the magistrate finds that ODOT entered into a contract delegating the highway construction work to Fechko, whose employee negligently backed a front-end loader into Simmons' sign pole and caused damage. "[W]hereas an employer is liable for the negligent acts of its employees committed within the scope of employment, an employer of an independent contractor generally is not liable for the negligent acts of the independent contractor." *Pusey v. Bator*, 94 Ohio St.3d 275, 278 (2002). "There are, however, exceptions to this general rule, several of which stem from the nondelegable duty doctrine. Nondelegable duties arise in various situations that generally fall into two categories: (1) affirmative duties that are imposed on the employer by statute, contract, franchise, charter, or common law and (2) duties imposed on the employer that arise out of the work itself because its performance creates dangers to others, i.e., inherently dangerous work. * * * If the work to be performed fits into one of these two categories, the employer may delegate the work to an independent contractor, but he cannot delegate the duty. In other words, the employer is not insulated from liability if the independent contractor's negligence results in a breach of the duty." *Pusey* at 279.

{¶16} Simmons asserts that the highway construction work performed by Fechko fits into at least one, if not both, of the categories of non-delegable duties, such that ODOT may have delegated the work, but not its duty, to Fechko. At trial, ODOT acknowledged the legal authority underlying Simmons' position regarding its affirmative

highway construction duty, and did not dispute the assertion that its duty under the circumstances presented in this case was non-delegable. ODOT disputed liability, rather, on the basis that the location of the sign was outside the boundaries of the "construction zone," on private property which Fechko had no authority to enter.

{¶17} The magistrate finds, however, that the actions of the Fechko employee in operating the loader around the sign occurred within the scope of Fechko's authority. The evidence demonstrates that the operator's actions were clearly incidental to the work Fechko was hired to do and, more likely than not, occurred within an area either where Fechko had been directed to work by ODOT or, whether through mistake or otherwise, where Fechko worked with ODOT's ratification. Sergeant Campbell, in whose jurisdiction the project took place and who worked special duty directing traffic through the construction zone many times, testified that he observed construction activity in nearly all the parking lots of businesses along the highway in this area throughout that time. Simmons' sign is at the outer edge of his parking lot, as little as 10 feet from the curb of the highway in its finished state, and ODOT did not offer any plan sheets or other evidence showing right-of-way boundaries or easements. Therefore, ODOT's argument regarding Fechko's scope of authority is not well-taken, and considering that there was otherwise no dispute at trial that ODOT is subject to liability for harm caused by Fechko's tortious conduct, the magistrate finds that ODOT is vicariously liable for the negligence of the Fechko employee.

{¶18} Next, the matter of damages shall be addressed. "The fundamental rule of the law of damages is that the injured party shall have compensation for all of the injuries sustained." *Fantozzi v. Sandusky Cement Prods. Co.*, 64 Ohio St.3d 601, 612 (1992). "As a general rule, the appropriate measure of damages in a tort action is the amount which will compensate and make the plaintiff whole." *N. Coast Premier Soccer, LLC v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 12AP-589, 2013-Ohio-1677, ¶ 17. "Although a party damaged by the acts of another is entitled to

be made whole, the injured party should not receive a windfall; in other words, the damages awarded should not place the injured party in a better position than that party would have enjoyed had the wrongful conduct not occurred." *Triangle Props. v. Homewood Corp.*, 10th Dist. Franklin No. 12AP-933, 2013-Ohio-3926, ¶ 52; *see also Henderson v. Spring Run Allotment*, 99 Ohio App.3d 633, 645 (9th Dist.1994).

{¶19} The magistrate finds that because Simmons' sign is affixed to the land, it constitutes real property. *See Dublin Bldg. Sys. v. Selective Ins. Co. of Am.*, 172 Ohio App.3d 196, 2007-Ohio-494, ¶ 30 (10th Dist.). The applicable standard by which to assess the measure of damages for injury to real property depends upon whether the injury is permanent or temporary. "Under Ohio law, the measure of damages for permanent injury to real property is the difference in market value of the property as a whole, including the improvements thereon, before and after the injury." *Case Leasing & Rental, Inc. v. Ohio Dept. of Natural Resources*, 10th Dist. Franklin No. 09AP-498, 2009-Ohio-6573, ¶ 27, citing *Ohio Collieries Co. v. Cocke*, 107 Ohio St. 238 (1923). On the other hand, "[i]n an action based on temporary injury to noncommercial real estate, a plaintiff need not prove diminution in the market value of the property in order to recover the reasonable costs of restoration, but either party may offer evidence of diminution of the market value of the property as a factor bearing on the reasonableness of the cost of restoration. While evidence of loss in market value of the property may be relevant, the essential inquiry is whether the damages sought are reasonable. Either party may introduce evidence to support or refute claims of reasonableness, including evidence of the change in market value attributable to the temporary injury." *Martin v. Design Constr. Servs.*, 121 Ohio St.3d 66, 2009-Ohio-1, ¶ 24-25; *see also B&B Contractors & Developers, Inc. v. Olsavsky Jaminet Architects, Inc.*, 7th Dist. Mahoning No. 12 MA 5, 2012-Ohio-5981, ¶ 78, *Monroe v. Steen*, 9th Dist. Summit No. 24342, 2009-Ohio-5163, ¶ 22, and *Northpoint Props. v. Charter One Bank*,

8th Dist. Cuyahoga No. 94020, 2011-Ohio-2512, ¶ 30-36 (holding that the principles set forth in *Martin* apply equally to commercial property).

{¶20} The magistrate finds that Simmons' property can be restored and that the injury is thus temporary rather than permanent; indeed, this was not disputed at trial. Accordingly, the measure of damages is the reasonable cost of restoration.

{¶21} "It is axiomatic that in order to determine the reasonable cost to restore property to the condition it was in prior to being damaged, a court must have evidence of the condition of the property before it was damaged." *PAG Holdings v. Love*, 2nd Dist. Greene No. 12CA0012, 2012-Ohio-3388, ¶ 11. Here, the magistrate finds that before the accident there was a significant crack in one of the sign faces, a piece of the sign face along the crack was missing, the lettering on the sign frames was faded or peeling, the metal components of the pole and sign frame needed to be repainted, there was rust and deterioration in places on the pole and sign frame, and the pole was at a minimum halfway through its useful life. The magistrate further finds that as a result of the accident, the pole was bent and dented, the pole was loosened from its foundation, two of the mounting brackets that attach the sign to the pole were broken, and the lighting elements inside the sign frame were rendered inoperable.

{¶22} Based upon Meyer's testimony that ABC Sign would not agree to perform any work on the sign short of a total replacement, Simmons' testimony that he contacted other sign companies who provided similar responses, and Meyer's testimony that if it were even possible to repair or replace all the component parts it would cost far more than erecting a new sign, the magistrate finds that the most reasonable method of restoration in this case is a total replacement of the sign/pole assembly. Although ODOT and Fechko argued that Simmons' recovery, if any, should be limited to the value of replacing or repairing certain component parts, the magistrate finds that the greater weight of the evidence showed that such repairs or partial replacements are not practicable.

{¶23} The magistrate also finds, though, that an award of damages for a total replacement would result in a windfall, for when the condition of the property before the accident is taken into account, it is apparent that Simmons would be placed in a better position than he would have enjoyed had the accident not occurred. Additionally, it is noted that neither party put on credible evidence regarding diminution of market value, nor were damages sought for loss of use.

{¶24} The magistrate finds that Meyer's estimate of $15,950 plus tax was a reasonable one for erecting a new sign. (It is noted here that Simmons moved at trial to amend the demand for judgment set forth in the complaint to conform with the more recent estimate, and the motion was granted on the record.) Considering Meyer's testimony concerning the useful life of the existing steel pole, as well as the deteriorated condition of the sign before the accident, the magistrate finds that Simmons is entitled to recover half the amount of the estimate, plus tax, as well as the fee associated with the necessary zoning certificate.

{¶25} Finally, ODOT's third-party claim against Fechko is one for contractual indemnity, asserting that ODOT is entitled to indemnification from Fechko for any damages awarded to Simmons. At trial, Fechko stipulated liability on the third-party claim, agreeing that it is indeed obligated to indemnify ODOT under the terms of their contract (Joint Exhibits 1,2) in the event Simmons is awarded damages.

{¶26} Based upon the totality of the evidence, the magistrate finds that Simmons is entitled to recover damages as follows: $7,975 (half the $15,950 estimate from ABC Sign), sales tax of $518.38 based upon the 6.5% rate for Butler County, the $150 fee Simmons paid to obtain a zoning certificate from the West Chester Township Community Development Department, and the $25 filing fee Simmons paid to commence this action. Accordingly, it is recommended that judgment be entered in favor of Simmons and against ODOT in the amount of $8,668.38. It is further

recommended that judgment be entered in favor of ODOT and against Fechko on the third-party claim in the amount of $8,668.38.

{¶27} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

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ROBERT VAN SCHOYCK
Magistrate

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